86-36

Supreme Court, U.S.
FILED
JUL 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

TERM, 1986

HAROLD N. SISEMORE

PETITIONER,

V.

UNITED STATES OF AMERICA

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT
AND
REQUEST FOR SUMMARY REVERSAL

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50pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a 1040X Amended U.S. Individual Income Tax Return (Claim For Refund) falls within the scope of 26 USC 6702, "Frivolous Return Penalty"?

2. Whether 26 USC 7430 prohibits an award of costs and attorney's fees to the prevailing party, other than the United States?

3. Holding the Act of Congress Unconstitutional in its enactment of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) pursuant to 28 USC 1252?

4. 26 USC 6702 being in conflict with the IRS Publication 586-A and 556?

5. 26 USC 6702 in violation and conflict with the 5th and 7th Amendments Right of Due Process and Trial by Jury?

6. Order treating as Summary Judgment being inappropriate when the Court is called upon to decide questions of

Constitutional Law without benefit of Trial?

7. Title 28 USC 1346(a)(1) gives Jury Trial to either party that requests Jury Demand?

8. Congress has created a Law Enforcement System in which criminal and civil elements are intertwined pursuant to 28 USC 1252?

PARTIES INTERESTED JOINTLY

Pursuant to Rule 19.4, 10.6 and 21(b) of the Supreme Court Rules the following parties interested jointly, with a Joint Appeal to this Court involving identical or closely related questions, have agreed to have the Petitioner, Harold N. Sisemore Pro Se, take his case, Sixth Circuit Court of Appeals File NO. 85-5825 with his filings and whatever the Court ruled in his case, would be accepted by all other parties.

This was agreed upon by the Petitioners to save this Court time and unnecessary paper work.

The following Petitioners with Sixth Circuit File Numbers opposite their names Appeal as follows:

Billy H. Burlison----------85-5846
Donnelly L. Sisemore-------85-5787

Sixth Circuit Joint Appeal-85-5038
Harold N. Sisemore---------85-5038

Donnelly L. Sisemore-------85-5922
Danny C. Landers-----------85-5923
Billy H. Burlison----------85-5924
Jerry D. Fertig------------85-5925
Adrian E. Hutchinson-------85-5926
Carl L. Locke--------------85-5927
Kem Clark-----------------85-5928
Robert Berggren------------85-5929

Orders were handed down by the Sixth Circuit of April 18, 1986 for each of the foregoing Petitioners with the exception of Harold N. Sisemore, Petitioner Pro Se 85-5825, which was handed down April 21, 1986.

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NO.

IN THE

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HAROLD N. SISEMORE

PETITIONER,

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RESPONDENT,

PETITION FOR A WRIT OF CERTIORARI
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APPEALS FOR THE SIXTH CIRCUIT
AND
REQUEST FOR SUMMARY REVERSAL

The Petitioner, Harold N. Sisemore,[1] Pro Se, respectfully requests that on Writ

---

1/ Billy H. Burlison, Donnelly L. Sisemore, and Joint Appeal No. 85-5038 (Listed iii,iv)

Of Certiorari issue from the judgment of the United States Court of Appeals for the Sixth Circuit, entered on the 21st of April 1986, to review the questions presented for review as the issues of this case have never been established by the other Courts. (Appendix E Section 1 and 2), (Joint Appeal Case 85.5038 Bottom of page iii)

OPINION BELOW

The Court of Appeals affirmed the District Court Orders January 30, 1986 and doubled attorney's fees and cost.(App. A) Motion for Reconsideration was denied April 21, 1986. (App. B)

The District Court ordered to treat this as one for Summary Judgment and disposed of it as provided in Rule 56 of FRCivP July 23, 1985 @ 12:30 p.m.(App.C) Motion to Reverse the Court's Direction was denied August 30, 1985 @ 3 p.m.(App.D)

Attorney fees and cost were assessed.

JURISDICTION

On April 21, 1986 the United States Court of Appeals for the Sixth Circuit denied Petitioner's Motion For Reconsideration to Reverse the United States District Court's Order to treat as one for Summary Judgment or trial by Jury of 12 peers under 28 USC 2402 and 1346(a)(1). (App.B) This Court has original jurisdiction under Article III of the Constitution of the United States and as set forth in 28 USC 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Constitution of the United States, Article I Section Seven and Nine and Article III. United States Amendments I, IV, V, VII, and VIII. Provisions of the Internal Revenue Code 26 USC §6702, §6703, and §7430. Senate

Report 98-562 Calendar No. 1058, and Public Law 97-248 (H.R. 4961, 97th Congress) IRS Rule and Regulations Publications 586-A and 556.

STATEMENT OF THE CASE

For the tax year 1981 and 1982 a 1040X Claim For Refund was filed and mailed March and May of 1984. For those years a 1040 form was filed and the tax paid. The Claims For Refund, without a hearing of any sort, was assessed a $500 TEFRA penalty pursuant to 26 USC 6702. The 15% was paid on each penalty pursuant to 26 USC 6703 and a complaint was filed in the United States District Court for the Middle District of Tennessee. On Aug. 30, @3 p.m. the Court issued an Order to treat as one for Summary Judgment, granting Attorney's fees and cost. (App.C) On Jan. 30, 1986 the United States Court of Appeals affirmed the District Court's

Order and doubled Attorney's fees and cost. (App.A) Motion for Reconsideration was filed Feb. 12, 1986 and that Motion was denied April 21, 1986. (App.B)

REASONS PETITION SHOULD BE GRANTED

Congressional intent pursuant to 26 USC 6702 was not to penalize a 1040X Claim For Refund. Calendar No. 1058, 98th Congress Senate Report 98-562 states:

PENALTY FOR FRIVOLOUS RETURNS

> "....The Committee stresses that the incorrect interpretation of the law by agents must cease immediately. The Committee urges that immediate action be taken by the Administrator of the IRS to correct the problem and insure that agents are interpreting the law correctly."

H.R. 4961, 97th Congress; Public Law 97-248, TEFRA states:

> "For example, the penalty under this provision is immediately assessable against any individual who files, as a purported Form 1040, a document appearing to be a Form 1040, but which contains altered or incorrect de-

> scriptions of line items or other altered provisions. Such purported "returns" are not designed to inform the Secretary of the filer's taxable income and are not in processible form....." (Emphasis mine)

The separation of the 1040X Claim For Refund comes under the Rules and Regulations of IRS Publications 586-A and 556, as the 1040X Claim For Refund is the only form set aside for this.

The Courts that have rendered an opinion concerning 26 USC 6702 have used the motive of the committee "to get" so called "tax protestors". The Courts did not examine the statute to determine if it actually manifested the express intent of Congress. The United States Supreme Court, Steward V. Kahn 78 US 504 stated:

> "The intent of the legislators constitutes the law."

The foregoing clearly shows that the authority is being abused and it was given for the tax liability and collecting of

taxes. There is no tax liability in this case, as the tax has already been paid.

The Tax Equity and Fiscal Responsibility Act of 1982, 26 USC 7430(a) states:

> "In the case of any civil proceeding which is--(1) brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty under this title, and (2) brought in a court of the United States (including the tax court), the prevailing party (other than the United States or any creditor of the taxpayer involved) may be awarded a judgment for reasonable litigation costs incurred in such proceeding."

Section 7430 of the Internal Revenue Code, 26 USC 7430, as enacted by 292 of the Tax Equity and Fiscal Responsibility Act of 1982, Public Law 97-248, H.R. 4961 97th Congress; Public Law 97-248 (Dec. 31, 1982) at 445 states:

> "Congress believes that taxpayers who prevail in civil tax actions should be entitled to awards for litigation costs and attorney's fees up to $25,000 when the United States has acted unreasonable in pursuing the case. Fee awards in such tax cases

> will deter abusive actions or overreaching by the Internal Revenue Service and will enable individual taxpayers to vindicate their rights regardless of their economic circumstances."

The TEFRA penalty is an unjustified act, under the color of law, and the Due Process Clause of the Fifth Amendment has the purpose to protect against having the Government impose burdens upon a person except in accordance with the valid Law of the Land.

Holding the Act of Congress unconstitutional in its enactment of TEFRA, Congressman Don Sundquist, letter of September 11, 1984 stated:

> "TEFRA was passed after the Senate struck the entirety of the House Bill and substituted its own language by Amendment..."

There is not a word in the Senate "version" of H.R. 4961, as passed by the Senate which "originated" in the House of Representatives. The Number H.R. 4961 was

all that remained the same as stated by Congressman Sundquist.

No Law can be enacted unless both Houses pass the same Bill. See:Rogers v. State, 72 Ark. 565, 82 S.W. 169 (1904); State v. Skaley, 108 Fla. 506, 146 So. 544; State v. Wisconsin Board of Medical Examiners, 172, Wis. 317, 177, N.W. 910 (1920).

In Blessing v. U.S., 447 F. Supp. 1160 the Court stated:

> "Where courts and litigations confront new and unsettled areas of law, clear preference exists for deciding cases on merit rather than precipitously disposing of them on pleadings."

IRS Publication 586-A Claim Procedure for Refund or Credit states:

> "Once you have paid your tax bill in full, you have the right to file a claim for refund or credit if you feel the tax is erroneous or excessive....(Emphasis added)

IRS Publication 556 Claim for Refund:

> "Once you have paid your tax, you have the right to file a claim for a credit or refund if you believe the tax is incorrect or too much. If you filed form 1040, or Form 1040A, or Form 1040EZ, you may claim a credit or refund by filing Form 1040X, Amended U.S. Individual Income Tax Return." (Emphasis added)

The foregoing RIGHT to file a 1040X Claim for Refund does not come under 26 USC 6702 as a RIGHT cannot be penalized.

The Fifth Amendment states:

> "No person...., nor be deprived of life, liberty, or property without due process of law;..." (Emphasis added)

The Seventh Amendment states:

> "....the right of trial by jury shall be preserved..."

The United States Supreme Court has consistently held that the right to due process involves the right to a hearing in cases both civil and criminal. The Court stated this principle in Joint Anti-Fascist Comm. V. McGrath, 341 U.S. 123, 168, 71 S. Ct. 624, 95 L. Ed. 817 (1951):

> "(T)he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardship of a criminal conviction, is a principle basic to our society."

The Supreme Court went on to clarify its position on what constitutes a hearing in Armstrong v. Manzo, 380 U.S. 545, 85 S. Ct. 1187, 14 L.Ed. 2d 62 (1965):

> "A fundamental requirement of due process is 'the opportunity to be heard'. It is an opportunity which must be granted at a meaningful time and in a meaningful manner."

In Goldberg v. Kelly, 397, U.S. 254, 90 S. Ct. 1011, 25 L.Ed. 2d 287 (1970), the Court went on to include in it definition of Due Process:

> "An effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally...."

With regards specifically to due process as it applies in matters of deprivation of property, the Court has said in, Mathews v. Eldridge, 424 U.S. 319, 96 S.

Ct. 893, 47 L. Ed. 2d 18 (1976):

> "This court has consistently held that some form of hearing is required before an individual is finally deprived of a property interest."

Other cases as to due process are: Commissioner of Internal Revenue v. Shapiro, 424 U.S. 614, 96 S. Ct. 1062, 47 L. Ed. 2d 278 (1976); Snidach v. Family Corp., 396 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969); Sniadach v. Family Corp., supra; North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 95 S. Ct. 719, 42 L. Ed. 2d 751 (1975) The Supreme Court noted in Giacco v. Pennsylvania, 382 US 399, 402-403 (1965):

> "It is established that a law fails to meet the requirement of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges or jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case."

A moving party is not entitled to

judgment as a matter of law, if the finding on the ultimate fact for either party is possible, nor is summary judgment appropriate if issues of fact are present, as the nature of the hazard is in regard to intent and state of mind, both of which are subjective and are not open to inspection by conclusions of laws. In the granting or treating an order as summary judgment granted the court's have stated:

> "Summary judgment cannot be granted if issues of fact are present." Homan Mfg. Co. v. Long, 23 FR SERV 634, 242 F 2d 645 (CA 7 1957).
>
> "In cases involving questions of motive intent, delicate constitutional rights, complex facts, situations disputed testimony and questionable credibility summary judgment is inappropriate." Benson v. Allphin, (1982 ND 111) 544 F. Supp. 464.
>
> "Without adequate factual basis in record, district court should be extremely hesitant to grant summary judgment on important and complex issues, particularly where Court is called on to decide questions of constitutional law without benefit of trial." Felix v. Young, (1976 CA 6

MICH) 536 F. 2d 1126.

> "Questions of motive and intent are particularly inappropriate for summary judgment adjudication." Welt v. Koehring Co., (1979 ND 111) 482 F. Supp. 437.

In Brown v. Bullock, 194 F. Supp. 207, Affirmed 294 F. 2d 415 the Court stated:

> "Motions for judgment on pleadings must be denied unless it appears to certainty that Plainiff's are entitled to no relief under any state of facts, which could be proved in support of claim."

28 USC 2402 JURY TRIAL IN ACTIONS AGAINST THE UNITED STATES states:

> "Any action against the United States under section 1346 shall be tried by the court without a jury except that any action against the United States under section 1346(a)(1) shall, at the request of either party to such action, be tried by the court with a jury.

This Petitioner made this request on the Complaint filed in Federal District Court but was never afforded a Trial by Jury.

Congress has created a law enforcement system in which criminal and civil

elements are intertwined. With these elements being intertwined the civil penalty deserves the same considerations as the criminal penalty. Criminal and Civil elements of a tax investigation are impossible to separate.

Mathis v. United States, 391 U.S. at pg 4 states:

> "This result is inevitable because Congress has created a law enforcement system in which criminal and civil elements are inherently intertwined."

United States v. LaSalle National Bank, 437 U.S. 298 (1978), at pg. 309 states:

> "The legislative history of the Code supports the conclusion that Congress intended to design a system in with interrelated criminal and civil elements."
>
> U.S. v. LaSalle National Bank, supra, pg. 310.

The Courts have long held that any code of laws that is part criminal and part civil must be considered criminal.

See Coffey v. United States, (1886) 116 U.S. 437; Boyd v. United States, (1886) 116; Iowa v. Chicago, B.& O. R.R. Co., (1889) 37 F. 497.

In the United States v. Claflin, (1878) U.S. 546, it is a well settled point that any civil code which contemplates criminal penalties and sanctions is unenforceable, null and void.

CONCLUSION

The Petitioner brings this petition for a ruling of this court on 1) whether an amended return (1040X Claim for Refund) falls within the scope of 26 USC 6702 for the purposes of imposing a "frivolous return penalty". The Petitioner believes and relied upon 26 USC 6702 in that it makes no provision for any penalty on a 1040X Claim for Refund; and, to further enhance my belief and to justify my actions having read IRS Publication 586-A

and 556 and the rights given in them, the 1040X is specifically separated from the 1040, 1040A and 1040EZ. Therefore this does not fall within the scope of the penalty.

2) Whether 26 USC 7430 prohibits an award of costs and attorney's fees to the Government. Having read and understood 26 USC 7430 and relying on specific wording excluding the United States as a party to collect costs and attorney fees, my petition is for this Court to rule on this issue. It is agreed by the Government and the Petitioner that the Courts are not precisely on point on these issues. This is a legal issue of continuing public interest in that should the Citizen have to bear the financial responsibility in violation of 7430 the result would be citizens being forced not to seek essential justice. (App. E, Sec. 1,2)

The action of the Government in not allowing this Petitioner Freedom of Speech in the Courts, no Due Process of Law, the amount in controversy being in excess of $20, my right to a trial by jury has not been preserved. I was required by 26 USC 6703 to forfeit $75 of my personal property before suit could be brought.

Petitioner seeks this Court to rule on the Constitutionality of TEFRA and its enactment. Should this Court rule that TEFRA is UnConstitutional this Petitioner is aware that no further ruling is necessary on 26 USC 6702.

The Courts treating this as one for Summary Judgment has not allowed Constitutional Rights to be afforded this Petitioner.

For the foregoing reasons a Writ of Certiorari and Request for Summary Reversal should be granted.

Respectfully submitted,

HAROLD N. SISEMORE Pro SE
RR 2, BOX 547
ERIN, TN 37061

CERTIFICATE OF SERVICE

I, Harold N. Sisemore, Petitioner Pro Se, hereby certify that I did on the _____ 12 TH, day of July, 1986 serve 3 copies of the original printed Petition for Writ of Certiorari and Request for Summary Reversal to the United States Court of Appeals for the Sixth Circuit, by first-class U.S. Mail, postage prepaid and the following:

Joe B. Brown U.S. Attorney
Room 879 U.S. Courthouse
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Nashville, Tennessee 37203

Michael L. Paup
Chief, Appellate Section
Tax Division
U.S. Department of Justice
Washington, D.C. 20530

Solicitor General
Department of Justice
Washington, D.C. 20530

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HAROLD N. SISEMORE	)	
	)	
Plaintiff-Appellant,	)	No.85-5825
	)	
v.	)	ORDER
	)	Filed:
UNITED STATES OF AMERICA	)	Jan. 30,1986
	)	
Defendant-Appellee	)	

BEFORE: ENGEL, MILBURN, AND RYAN
Circuit Judges

This pro se Tennessee taxpayer appeals from a district court judgment dismissing his suit as frivolous and finding him liable for costs and attorney fees in the amount of $221.50 for maintaining the suit in bad faith.

Plaintiff filed his suit in order to seek refund of two penalties assessed against him and his wife under 26 U.S.C. §6702(a) by the Commissioner of the Internal Revenue Service for their having filed two unsubstantiated and frivolous

amended income tax returns for the years 1981 and 1982. Plaintiff and his wife filed two amended tax return forms 1040X claiming that they had erroneously claimed their wages and salary as income in their initial returns. Attached to the amended returns was a memorandum of law in which they argued that their wages were a source of their income and were received in equal exchange for their labor. Upon review of the amended returns, the Commissioner assessed two $500 frivolous return penalties against the plaintiff and his wife pursuant to 26 U.S.C. §6702. After paying 15% of the penalties, or $150.00, the plaintiff sought a refund of the penalties from the Commissioner. Upon the denial of the refund, the plaintiff filed the instant law suit.

Upon review of the district court record and of the arguments presented by the

parties in their appellate briefs, this Court concludes that the district court properly dismissed plaintiff's suit and properly assessed costs and fees against the plaintiff in the stated amount. The Court also concludes that assertion of plaintiff's arguments in this appeal also warrants double costs and attorney fees to be assessed against him pursuant to Rule 38, Federal Rules of Appellate Procedure.

Courts have uniformly rejected plaintiff's argument attacking the constitutionality of 26 U.S.C. §6702 and its requirement to pay the penalty-assessment without prior notice before judicial review becomes available. Hudson v. United States, 766 F. 2d 1288, 1291-92 (9th Cir. 1985); Jolly v. United States, 764 F. 2d 642, 644-47 (9th Cir. 1985); Wardell v. United States, 757 F. 2d 203, 205 (8th Cir. 1985) (per Curiam); Anderson v.

United States, 754 F. 2d 1270, 1272 (5th Cir. 1985) (per curiam) Kahn v. United States, 753 F. 2d 1208, 1217-22 (3rd Cir. 1985). It is also clear that the plaintiffs amended returns fell within the scope of 26 U.S.C. §6702. The plaintiff filed the amended returns in order to show that he had no income and to claim refund of taxes paid in the years 1981 and 1982. Such requests for refunds did constitute returns within the meaning of §6702. Lovell v. United States, 755 F. 2d 517, 519 (7th Cir. 1984) (per curiam), cert. denied, 105 S.Ct. 1769 (1985); Anderson v. United States, supra, 754 F. 2d at 1272; Davis v. United States, 742 F. 2d 171, 173 (5th Cir. 1984) (per curiam). The penalties were also properly assessed against the plaintiff pursuant to 26 U.S.C. §6702 (a) because his amended returns on their face clearly showed that his assessment of

the taxes was substantially incorrect and that his position on the matter was frivolous. The returns reflected that taxes were withheld on wages earned and that the wages were erroneously reported as income but were now considered by the taxpayer as exempt for having been received in equal exchange for his services. The courts which have considered this position have uniformly rejected it as patently without merit, the assertion of which has also fully justified the penalty allowed under 26 U.S. §6702. Hyslep v. United States, 765 F. 2d 1083 (11th Cir. 1985); Jolly v. United States, supra; Stelly v. C.I.R. 761 F. 2d 1113 (5th Cir.), cert. denied, 106 S. Ct. 149 (1985); Lovell v. United States, supra; Davis v. United States Government, supra.

The assertion of the latter argument in the district court also supported the

district court's imposition of costs and reasonable attorney fees against the plaintiff because the argument is frivolous and its assertion was vexatious and in bad faith. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 259 (1975); Shimman v. Intern. Union of Operation Eng., Loc 18, 744 F. 2d 1226, 1230 & n.6 (6th Cir. 1984), cert. denied, 105 S. Ct. 1191 (1985). Review of the government's declaration in support of the fees and costs also shows that the amount awarded is reasonable under the circumstances of this case. Cf. Blum v. Stenson, 104 S. Ct. 1541 (1984); Northcross v. Board of Education of Memphis City Schools, 611 F. 2d 624 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980). Contrary to the plaintiff's assertion, the award of costs and fees for the government is not prohibited under 26 U.S.C.

§7430. This latter section was enacted to permit costs and fees to be awarded against the government in tax cases when its position was not substantially justified. It was, therefore, simply meant to supersede the Equal Access to Justice Act in tax cases. See Hall v. United States, 773 F. 2d 703, 706 n. 3 (6th Cir. 1985); United States v. Balanced Financial Management, 769 F. 2d 1440, 1451 n.12 (10th Cir. 1985). An award of costs and fees may still be awarded for the government in all cases where it must defend against frivolous and vexatious lawsuits. See Dallo v. I.N.S., 765 F. 2d 581, 589 (6th Cir. 1985); Stelly v. C.I.R., supra; Paulson v. United States, 758 F. 2d 61 (2nd Cir. 1985); Anderson v. United States, supra 754 F. 2d at 1272.

Finally, we believe double costs and attorney fees should be imposed against

the plaintiff because he has brought a frivolous appeal involving issues which have already been clearly resolved. See Martin v. C.I.R., 756 F. 2d 38, 40-41 (6th Cir. 1985); Perkins v. C.I.R., 746 F. 2d 1187, 1188-89 (6th Cir. 1984) (per curiam).

For these reasons, this panel unanimously agrees that oral argument is not necessary in this appeal. Rule 34(a), Federal Rules of Appellate Procedure. The district court's judgment is, accordingly, affirmed pursuant to Rule 9(d)(3), Rules of the Sixth Circuit. Double costs and attorney fees are also hereby awarded to the government pursuant to the decided case authority and Rule 38, Federal Rules of Appellate Procedure. An itemized and verified bill for the costs and attorney fees may be filed with the Clerk of this Court, with proof of service within

fourteen days after the entry of this order.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HAROLD N. SISEMORE	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
UNITED STATES OF AMERICA	)No. 85-5825
	)Filed:
Defendant-Appellee	)April 21,1986

Before: ENGEL, MILBURN and RYAN
Circuit Judges

Upon consideration of the plaintiff's motion to reconsider this Court's affirming the district court's judgment and assessing double costs and attorney fees against the plaintiff,

It appearing that this Court did not overlook or misapprehend any facts or points of law when it entered its order pursuant to Rule 9(d)(3), Rules of the Sixth Circuit.

It is hereby ORDERED that the motion be and hereby is denied.

ENTERED BY ORDER OF THE COURT

JOHN P. P. HEHMAN, CLERK

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE

HAROLD N. SISEMORE	)	
	)	
PLAINTIFF	)	
	)	
V.	)	
	)	
UNITED STATES OF AMERICA	)	NO.3-85-0320
	)	
DEFENDANT	)	

MEMORANDUM OPINION, ORDER
FINDING AND DIRECTION

As matters outside the pleadings have been presented to and not excluded by this Court, the motion of the defendant for a dismissal of this action, for failure of the plaintiff to state a claim upon which relief can be granted, is treated as one for summary judgment and will be disposed of as provided in Rule 56, F.R.Civ.P. There are no genuine issues of material fact extant between the parties herein, and this Court has already decided the relevant legal-issues in favor of the

defendant.[1/] Harold N. Sisemore, et ux., plaintiffs v. United States of America, defendant civil action no. 3:84-0939, memorandum opinion, etc. of December 5, 1984 (notice of appeal filed January 9, 1985); accord: Hill v. United States, 599 F. Supp. 118 (D.C. Tenn. 1984)

The defendant, thus, is entitled to a judgment as a matter of law, and its motion for summary judgment hereby is GRANTED. Rule 56(c), F.R.Civ.P.

Additionally, the Court FINDS that this action was frivolous and was maintained by the plaintiff in bad faith. For that reason, the United States is entitled to recover, as a part of its cost herein,

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1/ Whether a document filed with the Internal Revenue Service falls within the scope of 26 U.S.C. 6702(a) is a question of law for the Court to decide. Holker v. United States, 737 F. 2d 751, 752 (8th Cir. 1984); Hill v. United States, supra, 599 F. Supp. at 121 [3].

a reasonable attorney's fee and related expenses under 28 U.S.C. §2412(a)[2/] and the bad faith exception to the American rule generally denying such recovery in the absence of a contractual or statutory provision therefor. See Reed v. United States, 581 F. Supp. 718, 720-721 (D.C. Col. 1984); Lovell v. United States, 579 F. Supp. 1047, 1049 (D.C. Wis. 1984); Tibbetts v. Secretary of the Treasury, 577 F. Supp. 911, 915 [6] (D.C.N.C. 1984); Collorafi v. United States, 579 F. Supp. 506, 507 [2] (D.C.N.Y. 1983); cf. Perkins v. Commissioner of the Internal Revenue, 746

2/ "Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys. In addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency and any official of the United States acting in his or her official capacity in any court having jurisdiction of such action.* * * " 28 U.S.C. §2412(b).

F. 2d 1187, 1188-1189 [4] (6th Cir. 1984).

Counsel for the defendant will file forthwith his declaration under penalty of perjury, see 28 U.S.C. §1746, itemizing the number of hours he expended in representing his client in this proceeding, the approximate hourly-rate at which the United States has compensated (or will compensate) him for such representation, and any expenses incurred in such representation. The plaintiff will be allowed 5 days after such filing in which to submit any desired response.

Entry of a final judgment herein will await the Court's determination of the amount of allowable attorney's fee.

ENTER:

C.G. Neese
United States Senior Judge
District Judge by designation and assignment

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE

HAROLD N. SISEMORE	)
	)
Plaintiff	)
	)
v.	) No.3-85-0320
	)
UNITED STATES OF AMERICA	)
	)
Defendant	)

ORDERS, FINDING, AND DIRECTION

The motion of the plaintiff "TO REVERSE COURT'S DIRECTION OR MOTION FOR JURY TRIAL" hereby is

DENIED.

The motion of the plaintiff "TO STRIKE THE MOTION TO SET AMOUNT OF ATTORNEY'S FEES" hereby is

DENIED.

The Court hereby FINDS that $221.50 constitutes a reasonable attorney's fee and related expenses incurred by the United States of America in its defense of

this action. Accordingly, judgment will be entered by the clerk, denying the plaintiff all relief herein and awarding the defendant it costs of action, including $221.50 in reasonable attorney's fees and related expenses. Rule 58(1), F.R.Civ.P.

ENTER:

C.G. Neese
United States Senior Judge
District Judge by designation and assignment

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HAROLD N. SISEMORE, and JACQUELINE E. SISEMORE,	)
Plaintiff-Appellants	)
v.	)
	)No.85-5038
UNITED STATES OF AMERICA, and INTERNAL REVENUE SERVICE	)
Defendants-Appellees	)

MOTION TO PUBLISH OPINION

The United States of America through its counsel, respectfully moves this Court to publish its opinion of January 24, 1986, in the above captioned case, in which appellants' petition for rehearing was denied on April 18, 1986. In support of this motion counsel states as follows:

1. This case presented two questions that have been the subject of extensive litigation, in this Court and elsewhere over the last two years--viz., whether an

amended return falls within the scope of Section 6702 of the Internal Revenue Code of 1954 for purposes of imposing a Section 6702 "frivolous return" penalty and whether Section 7430 of the Internal Revenue Code prohibits an award of costs and attorneys' fees to the Government.

2. Although there are reported decisions on these questions in other circuits (as indicated in this Court's opinion of January 24, 1986), none are precisely on point on these questions, and this Court has not discussed these issues in a published opinion.

3. These questions have been litigated extensively by these and other taxpayers within this Circuit (see, e.g., Burlison v. United States (6th Cir.-No. 85-5846); Covington v. United States (6th Cir. No. 85-5464); Kittrell v. United States (6th Cir. No 85-5532) Harold N.

Sisemore v. United States (6th Cir. No. 85-5825); Donnelly L. Sisemore v. United States (6th Cir. No. 85-5787); Dolson v. United States (6th Cir. No. 85-5153); and Himes v. Commissioner (6th Cir. No. 85-5632);

4. Publication of this Court's opinion of January 24, 1986, would serve to eliminate any doubt taxpayers within this Circuit might otherwise have as to whether these questions have been authoritatively resolved by this Court;

5. Finally, we believe the case satisfies the criteria for publication set forth in this Court's Local Rule 24(a)(1)(i) and (iii), in that (1) it establishes a rule of law not previously established in this Circuit, and (2) it discusses a legal issue of continuing public interest.

WHEREFORE, the United States respectfully requests that the Court's Opinion in

this case of January 24, 1986, be released for publication.

ROGER M. OLSEN
Acting Assistant Att. Gen.
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

Dated: This 29th day of April, 1986.